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MAY, NINETEEN HUNDRED AND THIRTEEN.

NOTES.

LEGAL EFFECT OF A PARDON.—A felony at common law was regarded as an act *contra coronam et dignitatem regis.* The king, as head of the commonwealth, was alone interested in this breach of his peace, and a pardon by him wiped out the crime and the infamy attached thereto.[1] In this country the pardoning power,[2] vested generally in the executive by constitutional provision, must be interpreted in the light of the power formerly exercised by the king in England and the colonies.[3] As to its effect opinions differ. The

[1]See Cuddington *v.* Wilkins (1646) Hob. 67, 81.

[2]See United States *v.* Wilson (1833) 7 Pet. 150, 159. A pardon is a deed; it is invalid without delivery and acceptance, Hunnicut *v.* State (1885) 18 Tex. App. 498, 519, and is irrevocable when once granted. Knapp *v.* Thomas (1883) 39 Oh. St. 377.

[3]People *v.* Bowen (1872) 43 Cal. 439; 7 COLUMBIA LAW REVIEW 54.

courts are constantly asserting in broad terms that a pardon removes all legal consequences and disabilities ensuing from the commission of the offense pardoned;[4] they are unanimous in declaring that no further punishment may be inflicted in consequence of a pardoned crime, yet in determining what constitutes punishment they are in irreconcilable conflict. Thus in some jurisdictions it is held that to disbar an attorney on account of a conviction, subsequently pardoned, does not punish the offender, but merely protects the public,[5] while other courts declare that this is in reality a punishment.[6]

Another illustration of the divergent opinions of the courts in regard to the effect of a pardon is afforded by a recent case in New York, *People* v. *Carlesi* (1913) 139 N. Y. Supp. 309. A New York statute provides that a person who, after having been convicted in New York of a felony, or under the laws of any other government of a crime which, if committed in New York, would be a felony, commits any crime, is punishable upon conviction as for a second offense.[7] Carlesi had been convicted of counterfeiting under a federal statute, was pardoned, and then committed forgery. It was held that he could be sentenced as for a second offense under the statute, on the ground that the additional punishment was not a punishment for the first offense, but merely a heavier punishment for the second.

While this view has been sustained by other courts,[8] those of Virginia and Ohio have reached an opposite result,[9] declaring that the pardon of the first offense obliterates it, so that in legal effect, at least, the later crime is a first offense;[10] that the liability to be sentenced as for a second offense in committing a crime is a legal consequence of the first conviction, which is removed together with all other legal consequences and disabilities,[11] by the pardon; and that to impose an additional punishment upon a second conviction is to punish the offender to the extent of the additional sentence for a crime for which he has been pardoned.[12]

A pardon, however, does not reinstate the defendant in the situation in which he stood before conviction. For example, rights, which by judicial action since conviction have vested in others on account

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[4]State *v.* Baptiste (1874) 26 La. Ann. 134; 1 Bishop, New Criminal Law, (8th ed.) § 898, n. 1.

[5]Matter of ———— an Attorney (1881) 86 N. Y. 563; Nelson *v.* Commonwealth (1908) 128 Ky. 779; People *v.* Burton (1907) 39 Colo. 164.

[6]*Ex parte* Garland (1866) 4 Wall. 333; *Ex parte* Law (1866) 35 Ga. 285.

[7]Penal Law (Cons. Laws, c. 40) § 1941.

[8]People *v.* Price (1889) 6 N. Y. Supp. 833; Herndon *v.* Commonwealth (1899) 105 Ky. 197; Mount *v.* Commonwealth (Ky. 1865) 2 Duvall 93; see Evans *v.* Commonwealth (Mass. 1842) 3 Metc. 453.

[9]Edwards *v.* Commonwealth (1883) 78 Va. 39; State *v.* Martin (1898) 59 Oh. St. 212; State *v.* Anderson (1896) 7 Oh. N. P. 562; 1 Bishop, New Criminal Law, (8th ed.) § 919; see Commonwealth *v.* Morrow (Pa. 1872) 9 Phila. 583.

[10]See *Ex parte* Garland *supra;* 4 Bl. Comm. 402.

[11]State *v.* Baptiste *supra.*

[12]Courts holding that the statute punishes the first offense must logically declare it unconstitutional, as providing punishment for extra-territorial crimes. See 1 Bishop, New Criminal Law, (8th ed.) § 112, sec. 4.

of the crime, will not be restored.[13] Also, though a pardoned offender regains competency as a witness,[14] the conviction may still be urged to effect his credibility,[15] and it has been declared that when one arrests another for felony without notice that the felony has been pardoned he is not liable in damages for the arrest,[16] nor can one who is pardoned obtain damages for his imprisonment.[17] In like manner an applicant for admission to citizenship may be rejected on account of a conviction for an offense since pardoned,[18] offices forfeited will not be restored by a pardon,[19] nor will sureties on a bailbond be discharged thereby, when forfeiture has occurred before the pardon was granted,[20] although this amounts to holding the principal, who is ultimately liable.[21] Furthermore, at least one jurisdiction,[22] though in opposition to the weight of authority, takes the view that a pardon restores only civil rights, and not political rights, such as suffrage.[23]

Not only does the pardon fail to remove all the legal consequences of the crime, but it cannot obliterate the fact of the commission of the felony[24] or of the the moral guilt of the offender,[25] and, upon conviction of a subsequent offense, these facts may very properly be introduced as evidence that the accused belongs to the category of the

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[13]The reason is that the State cannot by action of the executive divest rights vested through the instrumentality of the judiciary. Matter of Flournoy (1846) 1 Ga. 606. As a deed of pardon must be construed most strongly against the grantor, Redd *v.* State (1898) 65 Ark. 475, 484, it would seem that a full pardon should restore rights which have vested in the State, though it is generally held otherwise in the absence of express words of restitution in the deed. Knote *v.* U. S. (1877) 95 U. S. 149.

[14]Diehl *v.* Rogers (1895) 169 Pa. 316; Werner *v.* State (1884) 44 Ark. 122.

[15]Bennett *v.* State (1887) 24 Tex. App. 73.

[16]3 Bac. Abr., (5th ed.) Title H., "Pardon"; see Cuddington *v.* Wilkins *supra.*

[17]Robertson *v.* State (N. Y. 1898) 30 App. Div. 106.

[18]*In re* Spenser (1878) 5 Sawy. 195.

[19]State *v.* Carson (1872) 27 Ark. 470; Commonwealth *v.* Fugate (Va. 1830) 2 Leigh 724; but see Hildreth *v.* Heath (1878) 1 Ill. App. 82.

[20]Dale *v.* Commonwealth (1897) 101 Ky. 612; see Weatherwax *v.* State (1877) 17 Kan. 427; but see Hatch *v.* State (1867) 40 Ala. 718.

[21]Pingrey, Suretyship & Guaranty, (2nd ed.) § 174.

[22]Ridley *v.* Sherbrook (Tenn. 1866) 3 Cold. 569; but see Jones *v.* Board of Registrars (1879) 56 Miss. 766; Wood *v.* Fitzgerald (1870) 3 Ore. 568, 573.

[23]On the other hand, a pardon remits all fines the right to which has not become vested in individuals, Cope *v.* Commonwealth (1857) 28 Pa. 297; Roe *v.* State (S. C. 1804) 2 Bay 565, and restores the right of a pardoned offender to serve on a jury, Puryear *v.* Commonwealth (1887) 83 Va. 51, 57, or act as executor. Matter of Raynor (N. Y. 1905) 48 Misc. 325. Likewise the pardoned life convict acquires anew the right to the custody of his children, Matter of Deming (N. Y. 1813) 10 Johns. 232, 483, and if a man is pardoned of a theft it is slanderous thereafter to call him a thief. Cuddington *v.* Wilkins *supra;* Leyman *v.* Latimer (1877) L. R. 3 Exch. Div. 15, 352.

[24]Baum *v.* Clause (N. Y. 1843) 5 Hill 196; *Ex parte* Hunter (1857) 2 W. Va. 122, 185.

[25]Eighmy *v.* People (1879) 78 N. Y. 330.

habitual criminal;[26] and since the object of the statutes providing for cumulative sentences for second offenses is not to impose an additional punishment for the former crime, but to punish the habitual criminal for his disposition to wilfully disregard the law,[27] the decision of the principal case seems entirely satisfactory. Moreover, this view would in the majority of cases effectuate the intention of the executive in forgiving the first offense, for though at the time of granting the pardon he evidently considered the offender worthy of restoration to his civil rights, he would undoubtedly have been of a different opinion had he suspected that the applicant for clemency possessed habitually criminal tendencies.

CONSTITUTIONALITY OF THE SHERMAN ANTI-TRUST ACT AS A CRIMINAL STATUTE.—It is a recognized rule of criminal law that in order to sustain an indictment under a penal statute the crime must be so clearly defined that all men subject to the penalty may know what acts it is their duty to avoid.[1] The courts of America upon one theory or another have regarded this principle as included in the requirements which the Constitution of the United States imposes upon criminal legislation. Perhaps the most satisfactory basis for this result is that the enactment of a law so indefinite that its terms require definition by the jury constitutes in fact a delegation of legislative power to the judiciary,[2] and thus is contrary to the spirit of our institutions. Such statutes have also been condemned as depriving persons of liberty or property without due process of law,[3] or as contrary to the sixth amendment in that the accused is not duly apprised of the nature of the accusation against him.[4]

As long as the Supreme Court of the United States insisted upon a construction of the Sherman Anti-trust Act, which, by strict adherence to the letter of that measure, condemned all agreements or combinations in restraint of trade,[5] there could, of course, be no question as to its validity so far as concerns the objection of uncertainty. But when the decisions in the *Standard Oil Case*[6] and the *American Tobacco Case*[7] introduced the "rule of reason" into the interpretation of the Statute, and held that only such combinations come within the ban of the Act as are in unreasonable restraint of trade, the question presented in *United States* v. *Patterson* (1912) 201 Fed. 697 immediately arose. The defendants in this criminal proceeding under the Statute set up that it was unconstitutional because uncertain. The

[26]People *v.* Raymond (1884) 96 N. Y. 38; People *v.* Price *supra;* Mount *v.* Commonwealth *supra.*

[27]People *v.* Raymond *supra.*

[1]Tozer *v.* U. S. (1892) 52 Fed. 917; see also U. S. *v.* Brewer (1891) 92 U. S. 278; Ballew *v.* U. S (1893) 160 U S. 187.

[2]L. & N. R. R. *v.* Commission (1884) 19 Fed. 679; U. S. *v.* Reese (1875) 92 U. S. 214.

[3]L. & N. R. R. Co. *v.* Commission (1896) 99 Ky. 132.

[4]U. S. *v.* Traction Co. (1910) 34 App. D. C. 592; Czarra *v.* Supervisors (1905) 25 App. D. C. 443.

[5]See Northern Securities Co. *v.* U. S. (1903) 193 U. S. 197; U. S. *v.* Freight Assn. (1897) 166 U. S. 290.

[6]Standard Oil Co. *v.* U. S. (1911) 221 U. S. 1.

[7]U. S. *v.* American Tobacco Co. (1911) 221 U. S. 106.